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No. 04-1498

IN THE

Supreme Court of the United States

RICHARD P. HOBBS,

Petitioner,

v.

COUNTY OF WESTCHESTER, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Richard P. Hobbs ("Hobbs") opens the factual statement of his Petition for a Writ of Certiorari ("Pet."), by introducing and identifying himself as a "busker" (Pet. at 2), creating an image of a quaint and harmless, albeit anachronistic, street performer whose right to engage in "innocent" expressive conduct has been restricted by the Westchester County Executive Order at issue here. The reality is far different in numerous respects.

First, and this fact informs the case, Hobbs was convicted two separate times for crimes involving sexual abuse of two boys (ages 11 and 14). In addition, affidavits were presented to the courts below that detailed Hobbs's sexual abuse of other boys that did not result in criminal charges. Second, it is not coincidental that Hobbs sought to busk at Playland Park, an amusement park that attracts many families with children, in that he deliberately targets children in his acts. As noted in the Second Circuit decision, a photograph introduced in the district court depicted Hobbs seated in a chair displaying balloon sculptures with a sign reading, in part, "A theater experience for 3 and 4 year olds". App. 35a. The court below took note of the complaint where Hobbs acknowledged, "'the balloon is a tool through which he conveys his message' and 'helps attract his audience' (Complaint at 13)"; and Hobbs's statement "that, although adults are repelled, his performance is particularly attractive to children, ..." App. 35a. The court below concluded, "It is undisputed that Hobbs had twice been convicted of child molestation, and his own descriptions of his act compel the conclusion that his act, using props, would entice children

to congregate around him." *Id.*[1] Third, contrary to the hyperbolic claim that is a central theme of the Petition, the decision of the court below upholding the Executive Order does not cause Hobbs or any other person to be a "First Amendment outcast". Pet. at 20. As a result of the decision, no speaker is silenced and absolutely no message is prohibited.

Similarly exaggerated is the claim that the decision breaks new ground in First Amendment law. Pet. at 1. As the court below held, the Executive Order focuses on conduct rather than speech, the manner of expression rather than content or viewpoint of the message. The only activities affected by the decision upholding the Executive Order are those Hobbs has admitted he engages in to attract children to him, the type of conduct that was involved in Hobbs's 1983 conviction and which the County's psychological expert stated pedophiles use to lure children to them, disarm their defenses and groom potential victims.

The Second Circuit's decision reflects a careful and painstaking analysis of the Court's precedents, starting with the undisputed premise that protecting the safety and welfare of citizens, especially children, is a governmental interest of surpassing importance. The judgment that the Executive Order at issue survives constitutional scrutiny breaks no new ground, it simply applies the analytical principles developed by the Court to this unique set of facts and the challenges

[1] Petitioner's 30 page *pro se* complaint in this action is replete with references to children, including the claim that children are attracted to him, and statements detailing his use of objects (including balloons) to attract and connect with children. Hobbs virtually fixates on children in his complaint, to which even the Second Circuit's limited quotations attest. App. 4a - 6a.

posed by the County's obligation to protect children from being victimized by persons convicted of sexual offenses against minors.

STATEMENT OF THE CASE

As found by the court below, Playland Park is a 279-acre a recreational complex owned and operated by Respondent, the County of Westchester ("the County"). Playland Park is comprised of a pool, picnic areas and shelters, a miniature golf course, a beach, boardwalk, lake, an ice skating rink, a museum and pier. There is a separate fenced-in amusement facility, including rides, games and concession stands. There is no entrance fee to the amusement facility, but fees are charged for the rides, games and at the concession stands. App. 2a.

In May 2000, Petitioner sought access to Playland Park purportedly for the purpose of "busking". App. 2a. His application was initially denied on grounds including that his busking activities conflicted with the paid entertainment provided by Playland Park and consistent with Westchester County laws and regulations that prohibited soliciting in County parks generally and at Playland Park specifically. In August 2000, plaintiff commenced this action, raising issues concerning the nature of Playland Park for purposes of First Amendment forum analysis and the constitutionality of the no-solicitation laws and regulations.

While the action was pending in the district court, Petitioner's two convictions of sexual offenses against minors came to light. In 1978 Hobbs was convicted on his plea of guilty to sexual abuse of a minor, a Class A misdemeanor. App. 11a. This conviction involved an 11-year-old boy who

was "grabbed" by Hobbs, taken to an office Hobbs had rented, and molested until he was able to break free and escape. *Id.* In 1983 Hobbs was convicted of Corruption of Minors, a misdemeanor in the first degree, after a jury trial in Lycoming County Court in Williamsport, Pennsylvania. Hobbs was sentenced to a term of 9 months to 4 years. As the court below stated with respect to this conviction,

> [T]he victim . . . testified that he was 14 when he was introduced to Hobbs; on that day, Hobbs was to give a performance as a clown in another town and the victim was to help Hobbs in that act; Hobbs fondled him throughout the round-trip car ride and at locations in and near the other town.

App. 11a.

Also during the district court proceedings, the County learned that Hobbs sexually abused two other boys, a 10 year old and a 14 year old. One of the boys was abused contemporaneously with the events that resulted in the 1983 conviction. The other boy was abused by Hobbs shortly after Hobbs was released from incarceration for the 1983 conviction. Affidavits detailing the sexual abuse were presented to the courts below, as the Second Circuit noted. *Id.*[2]

With this information Hobbs's motivation for seeking to perform at Playland Park came into focus. It was also clear

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[2] In the Petition, as in the court below, Petitioner characterizes the affidavits as "unsubstantiated". Pet. at 3. The Second Circuit concluded they were probative, apparently rejecting his deposition testimony on this subject as evasive and unconvincing.

that allowing Hobbs to engage in his balloon and other prop-assisted, child-oriented acts at Playland Park posed an unacceptable risk to the safety and welfare of children. This conclusion was based, in part, on expert information of a clinical psychologist and psychology professor who had been retained by the County in the litigation. The County's expert presented extensive experience in evaluating sex offenders for probation departments and courts and assessing the risks such offenders pose to children and communities. App. 9a - 10a. The County's expert opined, *inter alia*, that if convicted sex offenders – such as Hobbs – were able to present themselves to children and their guardians as harmless and entertaining (e.g., as a benevolent clown), they would be in excellent position to begin identifying, targeting and grooming potential future victims. App. 12a - 13a.

By Opinion and Order dated December 23, 2002 the district court invalidated the County laws and regulations banning solicitation in County parks and Playland Park that had been applied when Hobbs first sought to permission to perform at Playland Park. App. 63a - 88a. In view of that regulatory vacuum and the information that came to light during the litigation regarding Hobbs's sexual offenses against children, including the expert information relating to pedophile behaviors by which they groom victims, the County Executive enacted Executive Order 3-2003 to respond to this urgent matter of public safety. The Executive Order established specific zones where persons could engage in certain kinds of expressive activities without interfering with the general use of those facilities and a permitting scheme to regulate the use of the zones. The Executive Order also contains a provision (Section VI thereof, entitled "Prohibition") that prohibits any person who has been convicted of a sexual offense against a minor from engaging

in expressive activities that are most likely to lure children to the performer. The second paragraph of the Prohibition provides,

> Notwithstanding the aforementioned, no individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation, performance, demonstration or other similar activity would entice a child to congregate around that person since the granting of such a permit would involve an unreasonable risk to the safety and welfare of children.

App. 92a.

In this measured and considered manner the County Executive fulfilled his paramount obligation to safeguard the safety and welfare of children, at the same time burdening speech as little as absolutely necessary to achieve this goal.

Hobbs's challenge to the constitutionality to the quoted provision was rejected by the district court by Opinion and Order dated August 13, 2003. App. 44a - 62a. The Executive Order was analyzed under the strict scrutiny standard. App. 54a. That it addressed a matter of compelling state interest – protecting the safety and welfare of children – was a given. *Id*. The district court found that the Prohibition was narrowly tailored in that it applies only to individuals convicted of a sexual offense against a minor and even then, only if a number of other conditions relating to the manner of the expression were satisfied. App. 55a.

Hobbs appealed the portion of the district court's Opinion and Order that rejected his constitutional challenge (both on its face and as applied to him) to the Prohibition provision of the Executive Order. The Court of Appeals for the Second Circuit affirmed the district court. The Second Circuit found that the County had the requisite interest in the welfare of children in enacting the Executive Order, an interest of compelling governmental interest. App. 29a. The Second Circuit held, after an extensive analysis of the Court's relevant precedents, that the Executive Order was content-neutral. This conclusion was based upon the finding that the Executive Order restricts the manner of the expressive conduct by a person convicted of a sexual offense against a minor (e.g., Hobbs's balloon-assisted presentations that he uses to attract children to him), unrelated to the content of the message or its viewpoint. The court further found the Prohibition focuses on the harmful secondary effects of the activity, that is, the risk to children as a result of particular, but extremely limited, manners of expression. App. 30a - 32a. The court found no constitutional impediment to the application of the Prohibition to Hobbs. App. 35a. Hobbs's facial challenge to the Prohibition was similarly rejected. App. 37a.

REASONS FOR DENYING THE PETITION

The Second Circuit's decision does not conflict with decisions of this Court, or any other court, but rather is in accord with the Court's jurisprudence on all the issues raised in the Petition. There was no error in the holding the Executive Order under review is content-neutral and subject to the intermediate level of scrutiny, as it affects only the manner of expressive conduct and is unrelated to the content of the message. The Second Circuit decision affirming the

district court reflects a careful balancing of rights and the manner by which the County has determined to fulfill its undisputedly compelling interest in protecting children from sexual predation. The Court has noted its "normal practice" of "defer[ring] to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states." *Frisby v. Schultz*, 487 U.S. 474, 482 (1988). That deference is appropriate here, as both the district court and the Second Circuit reached the conclusion that the County's measured response to the threat to children from persons convicted of sexual offenses against a minor survives constitutional scrutiny.

The Petition vastly overstates the breadth and importance of the issues presented and the effects of the decision of the court below. Contrary to the impression created, the decision does not cause any person to be a First Amendment outcast, not even convicted sex offenders, people this Court has acknowledged have a high rate of recidivism, justifying the enactment of state reporting and monitoring laws that can be highly intrusive and onerous. *See, e.g, Smith v. Doe*, 538 U.S. 84 (2003). Also contrary to a claim in the Petition, there is no uncertainty based upon the Court's decisions that expressive conduct for persons convicted of a sexual offense against a minor can be burdened in the minimal manner here.

I. The Court Below Carefully Analyzed And Applied The Court's Precedents In Its Holding The Prohibition Is Content-Neutral

The Executive Order survives constitutional scrutiny under settled law, either (a) as a valid time, place, and manner restriction subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (the Second Circuit's reasoning), or (b) as a regulation of conduct, rather than speech, which is not subject to First Amendment scrutiny, under reasoning advanced by Justice Scalia in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307 (2000).

The decision of the court below to apply the intermediate scrutiny standard as a content-neutral regulation is fully consistent with the Court's decisions utilizing this analytical framework in analogous situations. *See e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (applying the content-neutral standard to ordinance prohibiting nude dancing because the prohibition was not an attempt to regulate the primary expression of the erotic message, but the secondary effects of the expression, i.e. impacts on public safety and welfare); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying the content-neutral analytical framework to an ordinance regulating sound, stating, "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [citation omitted]."); *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (applying content-neutral standard to regulation that prohibited overnight camping in Lafayette Park because it was not applied due to disagreement with the message presented (plight of the homeless) but to prevent damage to the park from certain kinds of uses).

The Second Circuit applied the tests for content-neutrality that have been long established by these and other cases. Applying such precedents, the court below correctly held the County's compelling interest in protecting children from being victims of sexual predation is unrelated to the content or viewpoint of the expressive activity. The Executive Order focuses on the particular manner by which messages are delivered (e.g., "prop-assisted") that entice children to congregate around the person known to have been convicted of a sexual offense against a minor. The Executive Order looks beyond the primary effect of the expression (e.g. enjoyment of the performance) to its secondary effects (e.g., grooming potential victims). App. 30a - 31a.

That the Executive Order was adopted solely to protect children from sexual predation further compels the conclusion it is content-neutral. "Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). There is no basis in the record to suggest the Executive Order was adopted because the County disagreed with Hobbs's purported messages about the plight of the homeless or government inefficiency or out of hostility to the content of the messages, if any, conveyed by his acts.

Moreover, the Executive Order can be viewed as a "'general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.'" *City of Erie v. Pap's A.M.*, 529 U.S. at 307-308 (Scalia, J., joined by Thomas, J, concurring in the judgment,

citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991)).[3]

In an attempt to find error where none exists, Petitioner glosses over the principal basis for the Second Circuit's holding that the Executive Order is content-neutral and focuses on its discussion of additional factors that can be taken into consideration in that determination. In fairness to the Second Circuit's detailed and lengthy analysis, the principal basis for the holding is the Executive Order, "focuses first – and potentially only – on the means by which the speaker's message is to be delivered." App. 30a. To be sure, the court observed, the contents of the proposed presentation can be examined, as well as the proposed props and/or equipment, to determine whether the presentation is likely to attract children. But the content of the message is irrelevant to the restriction.

> But the specific content of the speech – whether the speaker is talking about animals, fairy tales, government inefficiency, or the plight of homeless veterans – is irrelevant to the governmental goal

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[3] Justice Scalia stated,

> When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "[w]here the government prohibits conduct precisely because if its communicative attributes. . . . Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates."

City of Erie, 529 U.S. at 310 (quoting *Barnes*, 501 U.S. at 577).

> that a person with a criminal record of sexual offenses against minors not be permitted to use artifices to entice children to gather around him, developing rapport with the children and gaining new opportunities for child molestation. We conclude that the Executive Order constitutes a restriction only on the manner of speech and is designed to prevent harmful secondary effects unrelated to its content.

App. 33a.

In this holding the court below followed cases such as *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (analogizing case to *United States v. O'Brien,* 391 U.S. 367 (1968), and holding an ordinance prohibiting public nudity – ostensibly content related at least to some degree – was permissible because it was aimed at combating crime and other negative secondary effects and not at suppressing the erotic message conveyed by this type of nude dancing) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (majority holding that it was content-neutral for zoning ordinance to treat "adult" movie theaters differently from other theaters, even though such differentiation was based upon content, because the ordinance was aimed at the secondary effects of adult theaters, a justification that was unrelated to the content of the movies).

Petitioner's asserted conflict between the Second Circuit's decision and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), is illusory. The alleged conflict is premised upon the erroneous contention that there has been "no finding, no evidence, or even any claim," the Executive

Order was the least restrictive means to further the compelling governmental interest. Pet. at 10. Petitioner is incorrect on all three points. Both the Second Circuit and the district court found the Prohibition was narrowly tailored. App. 33a (Second Circuit); App. 55a (district court). The County argued to both courts (an alternate argument to the Second Circuit) that the Prohibition was narrowly tailored and the least restrictive means of achieving a compelling governmental interest. As to evidence the Executive Order was the least restrictive means, the Second Circuit quoted extensively from the County's expert, who stated there were special risks associated with the manner of expression by which a person convicted of a sexual offense against a child is able to present himself as harmless and entertaining. The County's expert concluded this manner of expression facilitates victimization of children. App. 12a - 13a. Hobbs presented no expert information.

There is no merit to the argument, in effect, that the Executive Order is "clear error" as a restriction based upon listeners' reactions to the expression under *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), *Boos v. Barry*, 485 U.S. 312 (1988), and the circuit court cases cited by Petitioner. Pet. at 9. This is not a case where expression is restricted because it is unpopular or deemed offensive to a potentially "hostile mob". Nor does the Executive Order raise the troubling issue posed by the ordinance in *Forsyth* that the decision of whether and how much money to charge for police protection and administrative time was (a) left to the whim of an administrator and (b) was a function of the amount of hostility the speech was expected to generate due to its content.

This case presents no such concerns. Neither on its face, nor in its application, does the Executive Order take into account listeners' reactions to the content of the message. It makes no difference that Hobbs's messages concerning the plight of homelessness are more likely to cause hostility or sympathy. Nor does the "enticement" element in the Executive Order raise the issue of "listener's reaction". This factor has no relation to the content of the message or the ideas conveyed by the expression. The question of application of the Prohibition of the Executive Order turns only on the manner by which the expression is conveyed, i.e., props and equipment, as the majority of the Second Circuit held and as quoted above.

Petitioner also raises the concern that courts and governmental bodies will be "improperly incentivized" to use listeners' reactions in fashioning or reviewing restrictions on speech. Pet. at 10. This dire prediction will not come to pass as it results from a misreading of the Second Circuit's opinion, as discussed above, and an exaggeration of the circumstances to which it applies. The fair reading of the Second Circuit's decision compels the conclusion it follows the Court's precedents with respect to manner of expression regulation only, based upon the relation between the recognized risk of recidivism and the particular conduct in which they seek to engage.

II. There Is No Merit To Petitioner's Claim That The Second Circuit Has Created A New First Amendment Principle In Its Secondary Effects Analysis

There is no merit to Petitioner's claim that the Second Circuit has created a "new First Amendment principle" that

"innocent speech can be prohibited or restricted because the positive impact of it might subsequently be used to facilitate criminal activity by the speaker". (Pet. at 11-12, 14). This argument, like the one relating to the Second Circuit's holding on the content-neutral issue, is based upon a mischaracterization of the decision, as well as an illusory conflict with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and other cases.

Free Speech Coalition is distinguishable for at least three reasons. First, it involved a total ban on speech of specified content (i.e. "virtual" child pornography). Here, however, any restriction on expressive conduct imposed by the Executive Order is limited to a particular group of individuals (persons convicted of a sexual offense against a minor), and then, only when such persons engage in a particular manner of expression. As the courts below observed, the Executive Order does not prevent Hobbs from expressing his views in words or expressive action. App. 32a (Second Circuit); App. 55a (district court).

Second, the Court in *Free Speech Coalition* noted that "the Government cannot ban speech fit for adults simply because it may fall into the hands of children." 535 U.S. at 252. Here, however, the Executive Order does not restrict a convicted sex offender's communications with adults, nor even with children, except under limited circumstances, as the Second Circuit noted. App. 38a - 39a.[4] Third, the majority

[4] Discussion of this point should not lose sight of the fact that it defies common sense that Hobbs actually seeks to address issues such as homelessness or governmental inefficiency when he does his act next to a sign providing "a theater experience for 3 and 4 year olds." This point was not lost on the Second Circuit and the decision notes the incongruity of the purported purpose of the expression and its "plainly child-oriented" manner. App. 40a.

noted that two of the principal arguments for the ban on virtual child pornography (i.e., to prevent pedophiles from using such images to encourage children to participate in sexual activity and to prevent pedophiles from "whet[ting] their own sexual appetites" by using such images) relied on a harm [that] flows from the content of the images, not from the means of their production." 535 U.S. at 241-42. The harmful effects discussed in *Free Speech Coalition* flowed from the speech itself. Here, the harmful effects are unrelated to the content of the message; indeed, for purposes of the Executive Order, the content – whether about homelessness, government bureaucracy, or any other topic – is wholly irrelevant. Rather, the harmful effects flow from conduct, the fact that a person convicted of a sexual offense against a minor has a high rate of recidivism (*see, e.g., Smith v. Doe*, 538 U.S. 84 (2003)) and such person's use of props or equipment in connection with a performance that entices children to congregate.

The Second Circuit decision does not create a new First Amendment principle. It merely follows a well-charted line of cases upholding time, place, or manner restrictions on expressive conduct. The Executive Order constitutes a "a restriction only on the manner of the speech and is designed to prevent harmful secondary effects unrelated to its content." App. 33a. Thus, it is necessary to misread the decision to conclude that it stands for the principle whereby "innocent" speech could be restricted based upon the positive impact of the content of such speech in facilitating criminal acts. Pet. at 14. This concern is wholly illusory. For example, as to Hobbs, no one has suggested that the content of Petitioner's message about homelessness (to take one of his examples) in any way facilitates his propensity to commit future criminal acts. Nor does the case involve the "mere

tendency of speech to encourage unlawful acts," *Free Speech Coalition*, 535 U.S. at 253. It is not the message that creates the risk of unlawful acts, but the manner of the expression – conduct – that creates undesired secondary effects. In this regard, the Second Circuit's reference to the secondary effects of the expression is no different than such considerations in the Court's cases on attempts to regulate nude dancing establishments, including *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), *City of Erie v. Pap's A. M.*, 529 U.S. 277 (2000), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

III. The Court Below Applied The Appropriate Standard of Evidence With Respect To The Secondary Effects Analysis

Petitioner assigns as error and a separate ground for granting the Petition that the Second Circuit did not require "actual evidence" (or "actual proof") the secondary effects of the harmful conduct would be deterred or reduced in a material way by the Executive Order. Pet. at 15. In so arguing, Petitioner both advances a standard this Court has not adopted – indeed, a standard a plurality of the Court has rejected – and fails to credit the Second Circuit's discussion of the issue, in which it specifically adverts to this Court's significant rulings and finds that the required degree of evidence with respect to secondary effects was satisfied.

In *Alameda Books*, a plurality of the Court held, "our cases require only that municipalities rely only upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address." *Id.* at 442 (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). In

so holding a plurality of the Court specifically declined to impose a higher evidentiary standard.

> In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and substantial, independent government interest. [citations omitted].

Id. at 438.[5]

Prior to *Alameda Books*, the foregoing evidentiary standard had been adopted by a plurality of the Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), with respect to a

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[5] The plurality also specifically declined to adopt the evidentiary standard advanced by Justice Souter in his dissent (joined in by Justices Stevens and Ginsburg and Justice Breyer, in part), as follows:

> In effect, Justice Souter asks the City to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. *See, e.g., Barnes, supra*, at 583-584, 111 S. Ct. 2456 (Souter, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a "reasonable opportunity to experiment with solutions to address the secondary effects of protected speech. [citations omitted]."

Alameda Books, 535 U.S. at 439.

challenge to an ordinance that regulated nude dancing in Erie establishments. In that case, as in *Alameda Books*, a plurality of the Court declined to adopt a higher evidentiary standard advocated by Justice Souter. The Court rejected the notion Erie had to conduct new studies and stated, "Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Id.* at 297.

The plurality also noted that the City of Erie relied on its own findings on the secondary effects question. First, the Erie City Council expressed, in the preamble to the ordinance, its findings for over a century that lewd and immoral activities are highly detrimental to the public health, safety and welfare and there is a connection. Second, the Court noted that the members of the Erie City Council, who are familiar with downtown Erie, possessed pertinent first-hand information as to conditions at and around nude dancing establishments upon which to make informed judgments as to their secondary effects.

The plurality in *City of Erie* also noted that *United States v. O'Brien*, 391 U.S. 367 (1968), was particularly instructive on the evidentiary issue, where, as here, the ordinance is on its face content-neutral. "The Court [in *O'Brien*] did not require evidence that the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. . . . There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests." *Id.* at 298-99. Similarly, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984), there was no study documenting

the effectiveness of the regulation on the goal of conserving park property, which was the rationale behind the prohibition on overnight camping in Lafayette Park.

The plurality opinion in *City of Erie v. Pap's A.M.*, again as in *Alameda Books*, specifically declined to adopt the position advocated by Justice Souter (concurring in part ant dissenting in part) for a more exacting evidentiary standard for the harm claimed to flow from the expressive activity and the alleviation expected from the restriction imposed, even in intermediate scrutiny cases. *Id.* at 313.[6]

The Second Circuit held the County met the evidentiary standard based upon *Alameda Books.* It was permissible for the County "to conclude that secondary-effects-oriented regulations are necessary" based upon the information relied upon by the Court in *Smith v. Doe*, 538 U.S. 84, 103 (2003), regarding recidivism rates of convicted sex offenders (which, the court below noted, quoted a 1997 United States Department of Justice report), as well as the County's expert. App. 34.

It is highly significant Hobbs offered no independent expert information in these proceedings.[7] It is insufficient

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[6] Justice Souter recognized that "[a] lesser showing may suffice when the means-end fit is evident to the untutored intuition." *City of Erie v. Pap's A.M.*, 529 U.S. at 317 n.1. Justice Souter also recognized the calculus might be affected by the nature of the legislating institution, the "novelty and plausibility of the justification raised" (quoting *United States v. O'Brien*, 391 U.S. 367, 391 (1968)) and the nature of the regulation. *Id.*

[7] Hobbs cited other United States Department of Justice studies and law review articles to the court below to challenge the recidivist data the Court relied upon in *Smith v. Doe*, but offered no independent data and no expert opinion in support of his efficacy argument.

for Hobbs to simply assert the County's evidence on this point was lacking, as the Court stated in an analogous situation in *City of Erie*,

> Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited.

529 U.S. at 298.

Hobbs's argument there was no evidence as to the efficacy of the Prohibition, creating a conflict with *Alameda Books* and *City of Erie* is similarly without merit. Pet. at 16, n. 4, 19. The Court's decisions in *Smith v. Doe,* 538 U.S. 84 (2003) and *McKune v. Lile*, 536 U.S. 24 (2002), among others, recidivist data cited in those cases, and the County's expert provided sufficient evidentiary basis as to the efficacy of the Prohibition in limiting opportunities for convicted sex offenders to lure children to them. As the court below observed, "Hobbs's 'efficacy' challenge is thus meritless and instead simply confirms there are other means by which Hobbs can deliver his messages." App. 36a.

The circuit court decisions relied upon by Petitioner on this point actually support the conclusion reached by the Second Circuit. In *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002), the court accepted the evidentiary basis for the city's interest in limiting the harmful secondary effects of nude dancing for people under 18 years old. Indeed, it was noted, "This circuit has declared that a city's stated purpose to limit the impact of secondary effects

must be credited and 'accorded high respect.' [citation omitted]". *Id.* at 1285. At the same time, however, the court found two affidavits (one from a former nude dancer and the other from the mayor *pro tem* that the court found conclusory and without factual foundation) insufficient to create a genuine issue of material fact to defeat a summary judgment motion. That case is inapplicable here, as it is indisputable the County has a compelling interest in protecting children from the harmful secondary effects of sexual predation by convicted sex offenders.

In *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002), the Fourth Circuit Court of Appeals accepted the evidence of harmful secondary effects of nude dancing establishments (e.g. at bars and clubs), as was deemed acceptable in *City of Erie* and *Alameda Books*. However, the regulation under review was not limited to bars and clubs, but would have been applicable to a wide range of locations and subject matters, including, "a political satire, a Shakespeare play depicting young love or a drama depicting the horrors of rape". 303 F.3d at 516. The court found there was no evidence at all as to the efficacy of the patently overbroad regulation.[8]

Petitioner's arguments on this point are illustrative of the Petition as a whole. Petitioner strains to misread the Second Circuit decision in an attempt to create conflict where none exists. The Second Circuit decision follows settled precedents in all respects. No grounds exist to grant the Petition.

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[8] Indeed, the court noted that due to the "undiscriminating terms of its restrictions . . . [it] would also punish the owners of the Charlotte Coliseum for allowing basketball players or coaches to give a congratulatory pat on the bottom during a game." 303 F.3d at 516, n. 4.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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